

Exhibit E

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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 AUTHORS GUILD, *et al.*,

4 Plaintiffs,

5 v.

23 Civ. 8292 (SHS) (OTW)

6 OPENAI, INC., *et al.*,

Conference

7 Defendants.

8 -----x

9 New York, N.Y.
10 December 3, 2024
9:47 a.m.

11 Before:

12 HON. ONA T. WANG,

13 U.S. Magistrate Judge

14 APPEARANCES

15 SUSMAN GODFREY LLP

16 Interim Class Counsel for Authors Guild and Alter Class
17 Actions

18 BY: ROHIT NATH

CHARLOTTE LEPIC

19 JORDAN CONNORS

ALEJANDRA SALINAS

20 AMBER MCGEE

21 J. CRAIG SMYSER

22 SUSMAN GODFREY LLP

23 Attorneys for The New York Times

24 BY: KATHERINE PEASLEE

ZACH SAVAGE

25 ALEXANDER P. FRAWLEY

ROTHWELL FIGG

Attorneys for New York Times and Daily News

BY: JENNIFER MAISEL

KRISTEN LOGAN

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APPEARANCES (continued)

LOEVY & LOEVY

Attorneys for Center for Investigative Reporting

BY: MATT TOPIC

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP

Attorneys for Authors Guild and Alter Class Plaintiffs

BY: RACHEL GEMAN

WESLEY DOZIER

ANNA J. FREYMAN

REILLY STOLER

KEKER VAN NEST & PETERS

Attorneys for OpenAI

BY: ROBERT A. VAN NEST

PAVEN MALHOTRA

MICHELLE YBARRA

ANDREW DAWSON

CHRISTOPHER SUN

THOMAS E. GORMAN

SARAH SALOMON

MORRISON & FOERSTER LLP

Attorneys for OpenAI

BY: JOSEPH GRATZ

CAROLYN HOMER

COWAN DeBAETS ABRAHAMS & SHEPPARD LLP

Attorneys for Authors Guild and Alter Plaintiffs

BY: CeCe COLE

LATHAM & WATKINS LLP

Attorneys for Microsoft

BY: ELANA NIGHTINGALE DAWSON

FAEGRE DRINKER BIDDLE & REATH LLP

Attorneys for Microsoft

BY: JARED BRYANT

JEFFREY S. JACOBSON

ORRICK HERRINGTON & SUTCLIFFE LLP

Attorneys for Microsoft Corporation

BY: ANNETTE L. HURST

Also Present:

Karen Chesley, The New York Times

Nick Standish, The New York Times

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1 motion number 230, which they put at the bottom of their list.
2 So maybe let's talk about 309 and if it's resolved, and then
3 when we get to the Authors Guild case, we can see if that is
4 taken care of in the issues in the Authors Guild case.

5 MS. SALOMON: Your Honor, if I may, just briefly.
6 This is Sarah Salomon from Keker Van Nest & Peters on behalf of
7 OpenAI.

8 We have a custodian motion at Dkt. 316 that I think
9 may have been skipped over. It's the next one on the agenda.

10 THE COURT: Okay. Oh, you know what, I was going
11 to -- I think I was going to grant that. This is number 316?

12 MS. SALOMON: That's right, your Honor.

13 THE COURT: All right. I'm sorry, it didn't make it
14 into one chart, but let me see. 316. Right. Okay. So this
15 is the issue where the -- let me see the total -- you've
16 provided the hit counts for the eight additional custodians,
17 right? It's eight additional custodians on which you've agreed
18 to one, and there's seven still in dispute, or is this
19 different?

20 MS. SALOMON: Sorry, your Honor. This is OpenAI's
21 motion for four additional custodians from The Times.

22 THE COURT: Oh. Okay. Let me see. I'm sorry. 316.
23 Oh, okay. Yes. This is the one where I wanted to know what
24 you had to suggest that these custodians had unique
25 information.

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1 MS. SALOMON: A couple things, your Honor, and I can
2 go custodian by custodian if that would be helpful.

3 So, first, for David Rubin who's the chief brand and
4 communications officer of the New York Times. We've seen him
5 on some communications vis-a-vis licensing and with high-level
6 executives. But I think more crucially The Times has already
7 conceded that he is likely to have information regarding the
8 harm or impact of -- on The Times' reputation of OpenAI's
9 products and services.

10 And the same is true of Michael Greenspan, who is The
11 Times global head of licensing. The Times has already conceded
12 that he has responsive information with respect to the markets
13 for their asserted works, and with respect to any alleged harm
14 to those licensing markets. For Hannah Masuga, she's the
15 technical director of machine learning. And so she is likely
16 to understand how The Times pay wall works and interacts with
17 bots.

18 And finally for Sam Dolnick, he's a deputy editor.
19 And without getting into any kind of confidential memos, he's
20 conveyed information about the impact of OpenAI's services on
21 the Newsroom. And so The Times has conceded the relevance of
22 these four custodians, but solely argues duplicativeness.

23 THE COURT: Wait, let me stop you right there. So
24 when I issued my decision on ECF 236, there were certain
25 categories of documents that The Times had already agreed to

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1 provide that weren't at issue. Right? And is it from those
2 documents that you're seeing that these people are involved?

3 MS. SALOMON: That's correct, your Honor.

4 THE COURT: All right. But they weren't custodians --
5 I mean, I guess the argument cuts both ways because if you got
6 the documents that referenced these people and suggested that
7 these people would have information, and you got them from --
8 not these people as custodians, then that shifts in one
9 direction toward maybe they don't have unique documents.

10 MS. SALOMON: Sure, your Honor.

11 THE COURT: At the same time.

12 MS. SALOMON: I take your point. I think that at this
13 stage, the best thing to do would be exactly what OpenAI has
14 had to do vis-a-vis its eight -- or maybe that number has since
15 grown -- custodians is provide the hit counts as across our
16 current search terms. And if it reflects duplicativeness,
17 that's one thing, but we just don't have that information yet.

18 THE COURT: Okay. So has New York Times provided the
19 hit counts? Do you have the hit counts for these four proposed
20 custodians?

21 MS. PEASLEE: Sure. Katherine Peaslee from Susman
22 Godfrey for The New York Times. We have not provided hit
23 counts from these custodians, your Honor, because in order to
24 provide the hit counts, we have to first collect those
25 documents, which for The New York Times is actually a fairly

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1 slow and cumbersome process. And because we don't believe that
2 these custodians have any non-duplicative documents and we've
3 not heard any other reasons from OpenAI for us to think
4 otherwise. We have not taken the steps of collecting them. We
5 are preserving their documents. But we just don't see a basis
6 for collecting documents from custodians who will be
7 duplicative.

8 Exactly to your point, your Honor, the reason they
9 know about these custodians is because they appear on documents
10 that have already been produced. And we've laid out in the
11 response the reasons why custodians we have agreed to,
12 including ones we've more recently added, are better sources
13 for these documents. Certainly equally good sources for the
14 documents they're seeking anyway.

15 I will say particularly with respect to Sam Dolnick,
16 OpenAI has said they need his documents because he has a
17 broader focus on the impact of GenAI on the Newsroom. Putting
18 aside the fact that we disagree he would have non-duplicative
19 documents on that point, that's also an area of discovery that
20 is not at issue in this case, per your Honor's order on the
21 22nd. So we think that knocks that one out.

22 THE COURT: I mean, to be fair, that motion was --
23 that motion was filed before I issued ECF 344. So I guess what
24 I'm trying to understand is in light of what I said in ECF 344,
25 is there a narrower scope? And what else do you have that

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1 suggests that there's unique documents?

2 And, again, I'm going to caution, I don't want this in
3 any way to be a backdoor around what I said in ECF 344. Okay?
4 Go ahead.

5 MS. SALOMON: Sure, your Honor. May I just address a
6 few points?

7 Ms. Peaslee has raised that The Times has agreed to
8 produce documents from other custodians, but as yet, has not --
9 I believe it's 22.

10 THE COURT: Okay. Let's stay on this issue first.

11 MS. SALOMON: In terms of whether there's a narrower
12 scope?

13 THE COURT: Yeah.

14 MS. SALOMON: Your Honor, the documents we're seeking
15 from these four custodians are not implicated by 344. It's
16 information that The Times concedes that we're entitled to in
17 terms of its brand, its reputation, and any harm therefrom. In
18 terms of its licensing markets, I haven't understood The Times
19 to say that is irrelevant or not impacted by -- or impacted by
20 that order. Vis-a-vis Mr. Dolnick, what we're asking for is
21 specifically defendants' conduct, any impact on the Newsroom,
22 and not the scope of other generative AI products.

23 And so it's not our understanding at least that
24 anything that we've been asking for is impacted by that order
25 here.

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1 THE COURT: Okay. So maybe my question is for
2 Ms. Peaslee because my sort of ultimate thing to go to is how
3 long is it going to take to run, you know, collect and run and
4 provide hit counts of non-duplicative documents?

5 MS. PEASLEE: Sure, your Honor.

6 So The Times could do that in a couple of weeks I
7 believe. But what I will say is that there are other
8 custodians we have agreed to add. And that's relevant because
9 in order for us to collect documents from these individuals and
10 run search terms, we will have to pause the process of
11 collecting documents from the ones we have agreed to. There's
12 one person internal at The Times who does the collection
13 process and gets those to us. And so it's just going to slow
14 down the discovery that we have agreed to and that the parties
15 are cooperating on.

16 So that's a factor to take into consideration. And,
17 again, we just don't think that it's warranted in this case
18 because there's nothing that OpenAI has pointed to suggest
19 these additional custodians are necessary.

20 MS. SALOMON: Your Honor.

21 THE COURT: What are the other custodians you've
22 agreed to add? How many are they?

23 MS. PEASLEE: I believe there are ten recent
24 custodians, and I can point to the ones that we think are
25 relevant to the ones they've asked for. For instance, for

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1 David Rubin, we think Amy Weisenbach, Greg Miller, Ben Frumin,
2 Leilani Han and David Perpich are all just as good or better
3 sources for the documents they're seeking. And they're all
4 people that we are collecting documents from, running search
5 terms over, forming that process on .

6 MS. SALOMON: Your Honor, may I respond briefly?

7 THE COURT: Sure.

8 MS. SALOMON: As yet, The Times hasn't given a clear
9 indication of why it would be unduly burdensome to perform the
10 basic exercise of collecting documents from custodians. If the
11 issue is they only have one person who is doing that, then
12 perhaps they should level up and assign additional people to do
13 that. But that's a basic function of discovery in a case
14 you've brought.

15 THE COURT: Why is it so burdensome? Talk to me about
16 the document -- I mean, I hate to get this granular, but you
17 all are making me get this granular. I would prefer not to get
18 there.

19 Why is it that there's only one person at the New York
20 Times who's doing the document collection?

21 MS. PEASLEE: Well, your Honor, there's one person
22 whose function it is and it's a small company, so just -- it's
23 not -- they are not a software company. They don't have, you
24 know, an expansive IT department who can assign a bunch of
25 people to do this. And, in fact, The Times specifically hired

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1 a new person, took on a temp, I believe, in order to help
2 facilitate this process. They're just not set up the same way
3 that say a Microsoft or an OpenAI might be to facilitate this
4 kind of electronic discovery.

5 THE COURT: So the one person who's doing it is the
6 new hire?

7 MS. PEASLEE: I believe that's correct.

8 MS. SALOMON: Your Honor, apologies for interjecting,
9 but might I suggest an ESI vendor. I know you don't want to
10 get this granular, but there are ways around this. This is not
11 a new problem or issue.

12 THE COURT: Ms. --

13 MS. PEASLEE: I'm sorry? I'm sorry, I thought you
14 said --

15 THE COURT: Yeah. So are you using an ESI vendor?

16 MS. PEASLEE: Yes. We are absolutely using an ESI
17 vendor. It's the collection process that someone internal has
18 to go do and then get it to the vendor.

19 THE COURT: So the vendor can't help in that process?

20 MS. PEASLEE: There have been security concerns on The
21 Times' side about having the ESI vendor go into their systems.

22 THE COURT: All right. What's the other, the other
23 custodians you've agreed to add and you said you'd have to
24 pause from the other additional custodians, how long is that
25 process going to take?

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1 MS. PEASLEE: Well, it would just -- we would pause
2 while we collect the other materials, go back, continue.

3 THE COURT: No, I'm saying if you put these custodians
4 hit count at the end of the collection for the other
5 custodians, how long does that push back this issue?

6 MS. PEASLEE: Sure. I don't know the exact answer. I
7 would guess a couple of weeks. But I don't want to commit to a
8 firm date because, frankly, I don't know exactly where they
9 are.

10 THE COURT: Okay. Meet and confer on this issue.

11 Look, I'm inclined to give you the hit counts, but
12 given what I've heard about the issues that The Times is
13 dealing with in terms of document collection, that, you know,
14 you may have to talk about whether you would rather get the
15 documents from the custodians you've heard, you have gotten,
16 and you get to review them, keeping in mind what The Times is
17 saying about how these four additional proposed custodians
18 probably only have things that are duplicative.

19 You have another conversation after you get these
20 additional custodians documents, see if this is still an issue.
21 If it is, I'm going to ask them to provide hit counts, but I'm
22 not going to make them do that work and pause other things
23 they're doing right now. Particularly, if it's standing in the
24 way of you actually getting documents they've agreed to
25 produce. Okay?

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1 MS. SALOMON: Thank you, your Honor.

2 MS. PEASLEE: Thank you, your Honor.

3 THE COURT: So meet and confer on that. Okay.

4 So now are we down to the question of Slack messages
5 in ECF 309? Is there anything remaining in dispute in ECF 309
6 now?

7 MR. FRAWLEY: Good morning, your Honor. Alexander
8 Frawley from Susman Godfrey for The New York Times.

9 I think, your Honor, there are two things remaining in
10 dispute for Dkt. 309, and they're the two issues related to
11 Microsoft. One of those issues is the Slack channel issue that
12 you just mentioned. For that issue, all we're seeking is
13 confirmation from Microsoft or OpenAI that this process of
14 OpenAI reviewing these Slack channels is not going to result in
15 omitting documents from the agreed upon Microsoft custodians.
16 So it doesn't matter to us if Microsoft does the pull and
17 produces the documents or if OpenAI does the pull and produces
18 the documents. We just want to make sure we're not missing out
19 upon the agreed upon Microsoft custodians. And if we can get
20 that assurance from either defendant, then this portion of the
21 motion can be resolved, too.

22 The second issue is about the format of text messages
23 that Microsoft will produce. And I think on that issue, your
24 Honor, we've been meeting and conferring. We're happy to pause
25 on that issue for now. Microsoft hasn't produced any text